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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-940

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

No. 74-949

MARY AKIN, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF AMICI CURIAE,

Southern Ute Indian Tribe, Ute Mountain Ute Indian Tribe, Mescalero Apache Tribe, Agua Caliente Band of Mission Indians, Colorado River Indian Tribes, Hualapai Tribe, Gila River Indian Community, Shoshone-Bannock Tribes of The Fort Hall Reservation, Burns Paiute Indian Tribe, Devils Lake Sioux Tribe, Assiniboine and Gros Ventre Tribes of The Fort Belknap Reservation, Pueblo of Zuni, Pueblo of Santo Domingo and National Tribal Chairmen's Association

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MARY AKIN, ET AL.,
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Respondent.

BRIEF OF AMICI CURIAE, SOUTHERN UTE INDIAN TRIBE, ET AL.

STATEMENT OF INTEREST

By letter to the Clerk of the Supreme Court, dated September 15, 1975, the petitioners have given their written consent to the filing of this brief. The Solicitor General has also given his consent on behalf of the United States.

Amici Curiae Southern Ute Indian Tribe and Ute Mountain Ute Indian Tribe are the equitable or beneficial owners of the water rights appurtenant to the Southern Ute and Ute Mountain Ute Indian Reservations in Colorado which the United States

seeks to adjudicate in this action. Both of these *amici* intend to intervene and participate in the trial of this case on remand. They did not have an opportunity to intervene prior to the district court's dismissal. However, they appeared as *amici curiae* in the district court to urge reconsideration of the dismissal order and filed a brief *amici curiae* in the court of appeals urging that the district court's decision be reversed.

The other *amici,* except for the National Tribal Chairmen's Association, are organized, self-governing Indian tribes. recognized as such by the Secretary of the Interior. All of them are located within the states that have filed briefs *amici curiae* in support of the petitioners. All of them have water rights which stand to be affected by the outcome of these cases.

The National Tribal Chairmen's Association is an unincorporated, non-profit organization of all duly constituted chairmen, presidents, governors and chiefs of federally recognized Indian tribes, and the presidents of the twelve Alaska Regional Corporations established under the Alaska Native Claims Settlement Act. The Association and all of its members are vitally interested in preserving and protecting the water rights of Indian tribes and in maintaining exclusive federal and tribal jurisdiction over Indians and Indian lands except where state jurisdiction has been specifically authorized by Congress. The water rights of the Indian tribes located in Colorado, the Southern Ute and Ute Mountain Ute, are at issue in this litigation.

Tribal and individual Indians' rights to the use of water, like rights to the lands which constitute their reservations, are recognized and protected by

treaties, statutes, and agreements entered into with the federal government. The landmark case of *Winters* v. *United States,* 207 U.S. 564 (1908), held that the right to the use of water for the benefit of the Fort Belknap Indian Reservation was impliedly reserved in the treaties and agreements creating that reservation. Protecting these rights to the use of water is absolutely critical to the continued existence and development of all Indian reservations, for without the use of water they are barely inhabitable, and their residents are almost certainly doomed to perpetual impoverishment. Indian water rights are akin to the fishing rights considered by the United States Supreme Court in *United States* v. *Winans,* 198 U.S. 371, 381 (1905); they are "not much less necessary to the existence of the Indians than the atmosphere they breathe."

These *amici,* hereafter referred to as "the Indian *amici,*" steadfastly oppose the adjudication of their precious water and other property rights in state courts. To the best of their knowledge, the federal district court's dismissal of this action in favor of the state court proceeding is unprecedented. All previous adjudications of Indian water rights have taken place in federal forums without any apparent adverse affects on the states and their water adjudication systems. The district court's disposition threatens to alter, drastically and disastrously, the historical relationship that has developed between the federal government and the Nation's Indian tribes. That relationship leaves little or no room for the states and their courts. *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685 (1965); *Williams* v. *Lee,* 358 U.S. 217 (1959).

For these reasons, the Indian *amici* support the position of the United States and urge that the decision of the court of appeals be affirmed. They will confine most of their argument to the vital issues of federal Indian law presented in this case. They believe that the failure of both the district court and the court of appeals to address these uniquely Indian issues represents a serious omission which, if continued, might lead to an improper disposition of these important cases.

STATUTE INVOLVED

The Indian amici believe that in construing the applicability of the McCarran Amendment, 43 U.S.C. § 666, 66 Stat. 560, reproduced in Petitioners' Brief at pp. 3-4, to the adjudication of Indian water rights, it must be read and interpreted in conjunction and *in pari materia* with Public Law 83-280, 67 Stat. 588, partially codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360. The McCarran Amendment was enacted in July 1952. Public Law 83-280 became law only thirteen months later, in August 1953. The Indian *amici* refer to, quote from and cite Public Law 83-280 throughout this brief. It is reproduced in full, as originally enacted, in the Appendix to this brief.

Public Law 83-280 was amended in certain respects not directly relevant to this case by the Indian Civil Rights Act of 1968, 82 Stat. 73, 78-80, 25 U.S.C. §§ 1321-1326. *See Kennerly* v. *District Court,* 400 U.S. 423 (1971).

SUMMARY OF ARGUMENT

I.

The adjudication of Indian water rights involves the determination of complex questions of federal law.

An unbroken line of congressional enactments and decisions of this Court leaves no doubt that the federal courts are, at a minimum, the proper and preferred forum for the resolution of Indian property rights disputes. This factor underscores the impropriety of the district court's dismissal in favor of the state court proceeding on the basis of absention and comity. The abstention doctrine cannot be applied here in any event because there are no qustions of state law presented that could obviate the need for deciding the federal questions. There is no other basis for the federal courts to decline to exercise their federal question jurisdiction.

II.

A. The McCarran Amendment, 43 U.S.C. § 666, waives the government's sovereign immunity only with respect to water rights covered in its proprietary capacity, not in its capacity as holder of water rights in trust or restricted status for the benefit of Indians or Indian tribes. The McCarran Amendment does not mention the words "Indian" or "trust" or "restricted." Not a single Indian or representative of an Indian tribe or organization was called to testify in any of the congressional committee hearings that led to the enactment of the McCarran Amendment. The waiver of precious Indian rights, privileges and immunities simply cannot be inferred from these circumstances given the standards previously set by this Court. The one or two isolated statements by the opponents of the bill are not entitled to any weight.

B. Even if the McCarran Amendment's waiver of sovereign immunity is held to apply to the government

as trustees for Indian water rights, it does not confer subject matter jurisdiction on state courts to adjudicate Indian water rights. In the absence of an express conferral of jurisdiction by Congress, state courts are without authority to adjudicate the property rights of Indians. *Kennerly* v. *District Court,* 400 U.S. 423 (1971); *Minnesota* v. *United States,* 305 U.S. 382 (1939). Congress expressly withheld such jurisdiction in enacting Public Law 83-280, 67 Stat. 588, only one year after the McCarran Amendment. If Congress had intended to confer subject matter jurisdiction on the state courts over Indian water rights, it would have had to waive or repeal or consent to the amendment of the Indian jurisdictional disclaimers contained in the enabling acts or constitutions of most of the Western States. The McCarran Amendment, unlike Public Law 83-280, did not even purport to remove any of these legal impediments to the assumption of state jurisdiction. The critical distinction between this case on the one hand, and the *Eagle County* and *Water Division No. 5* cases on the other, is that federal courts have exclusive jurisdiction over Indians and Indian property whereas state courts have concurrent jurisdiction over most other federal lands and reservations.

III.

The federal court's total abdication of jurisdiction is not the proper way to reconcile the competing federal, state and Indian interests raised by this case. There exist procedures available to the district court which will enable it to eliminate any overlap between it and the state court and will result in the determination of federal questions in the federal court and state matters in the state court. Once the federal

and state courts have made their respective determinations, the two decrees can be integrated and their administration combined under a single federal-state water master.

IV.

The recent and historical performance of state courts in Indian cases provides an ample basis for the Indians' fear of submitting their all too few remaining property rights to adjudication in the state courts. Congress recognized both the existence and legitimacy of these fears in its enactment of 28 U.S.C. § 1362 in 1966.

V.

There is not and never has been any such thing as "unitary" state systems for the adjudication of all water rights within their respective boundaries. Indian water rights have uniformly been determined in the federal courts. The principal authorities relied upon by the petitioners have no application to the facts and circumstances of this case.

ARGUMENT

Introduction

This case concerns nothing more nor less than a choice of forum question. Will the extent and priority of the water rights of the Southern Ute and Ute Mountain Ute Tribes, as well as other, non-Indian, federal water rights, be litigated in state or federal court? *Amici* submit that the federal forum is not only the proper, but also the preferred and indeed the exclusive, forum for the adjudication of Indian reserved rights.

The court of appeals properly decided that it was error for the district court to have dismissed this case under the abstention doctrine. Under that disposition, it was unnecessary for the court of appeals to reach a major unsettled issue lurking in the background of this litigation; does 43 U.S.C. § 666, ("the McCarran Amendment") apply to Indian water rights or authorize their adjudication in state courts. The district court's dismissal of this action in favor of state court adjudication, without addressing this issue, assumed that McCarran applied and that the state courts had such jurisdiction. If this Court should uphold the district court and reverse the court of appeals on the abstention issue, it would then have to confront this heretofore unanswered, but vitally important, question. Alternatively, the jurisdictional issue provides an independent basis for affirming the holding of the court of appeals for if, as we believe, state courts are without jurisdiction to adjudicate Indian water rights, this action must proceed in the federal court.

In this brief, the Indian *amici* will show: (1) that federal courts are the proper and preferred forum for adjudicating Indian water rights; hence abstention is peculiarly inappropriate here; (2) that the McCarran Amendment does not apply to Indian water rights or, alternatively, if it does, it does not authorize their adjudication in state court; (3) that no practical problems will result from adjudicating Indian and federal water rights in federal court that cannot easily be resolved by the proper management of this litigation by the federal district court in a manner consistent with the decision of the court of appeals; and (4) that the Indian tribes' fear of litigating in the state courts is well founded and justified. In the last section of

this brief, the Indian *amici* will respond to some of the petitioners' contentions.

I. Federal Courts Are The Proper and Preferred Forum For The Adjudication of Indian Water Rights.

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson,* 324 U.S. 786, 789 (1945), quoted with approval in *McClanahan* v. *Arizona Tax Commission,* 411 U.S. 164, 168 (1973). Congress has consistently and repeatedly implemented this principle by vesting jurisdiction to adjudicate Indian property rights exclusively in federal courts. The earliest example is 25 U.S.C. § 345 originally enacted in 1894.[1] It confers exclusive jurisdiction on federal district courts to resolve disputes relating to Indian allotments. *See McKay* v. *Kalyton,* 204 U.S. 458 (1907).

25 U.S.C. § 357, enacted in 1901, provides that Indian allotted land "may be condemned for any public purpose under the laws of the State . . . where located in the same manner as land owned in fee may be condemned." On its face the statute is silent as to whether the condemnation proceedings are to take place in state and/or federal court. Despite the fact that Section 357, unlike the McCarran Amendment, makes state substantive law applicable to some Indian lands, this Court held in *Minnesota* v. *United States,* 305 U.S. 382 (1939), that it did not confer jurisdiction on state courts.

> There are persuasive reasons why that statute should not be construed as authorizing suit in a state court. It relates to Indian lands under trust

[1] *See also* 28 U.S.C. § 1353.

> allotments—a subject within the exclusive control of the federal government. The judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts.[2]

In 1953, during the height of the so-called termination era, Congress enacted Public Law 83-280, 67 Stat. 588, now partially codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360 and, as amended in 1968, 25 U.S.C. §§ 1321 and 1322.[3] Public Law 83-280 also demonstrates Congress' commitment to having Indian property disputes resolved in the federal courts. While expressly conferring limited civil jurisdiction on state courts to adjudicate controversies arising in Indian country, Congress specifically withheld from state courts jurisdiction to adjudicate "the ownership or right to possession of [real or personal property, *including water rights,* belonging to any Indian or Indian tribe] or any interest therein." 28 U.S.C. § 1360(b) and 25 U.S.C. § 1322(b) (emphasis added). Thus, even when Congress extended state jurisdiction over Indians, it was careful to insure that Indian property and water rights were not subjected to state court jurisdiction.

Congressional policy could not be more explicit or consistent—disputes involving Indian property rights are to be litigated in federal courts. The Court has faithfully adhered to and even extended that mandate as in *Minnesota* v. *United States, supra.* In furtherance of this same policy, in *Oneida Indian Nation* v.

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[2] 305 U.S. at 389. As noted *infra* at p. 11, Congress expressly approved and followed the holding of Minnesota v. United States in enacting 28 U.S.C. § 1362 in 1966.

[3] We refer to Public Law 83-280 repeatedly throughout this brief and have therefore reproduced it in its entirety in the Appendix.

County of Oneida, 414 U.S. 661 (1974), this Court unanimously held that an Indian tribe's ejectment action, unlike identical actions brought by other claimants to land under federal law, was within the federal courts' federal question jurisdiction. The Court's opinion noted:

> There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law *and federal courts* must be deemed the controlling considerations in dealing with the Indians.[4]

28 U.S.C. § 1362, enacted in 1966, provides for federal question jurisdiction in the federal district courts over civil actions brought by Indian tribes, without regard to the amount in controversy. Its legislative history demonstrates that it was prompted by *Yoder* v. *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation,* 339 F.2d 360 (9th Cir. 1964), which held that Indian tribes could not bring property rights litigation in federal court without satisfying the $10,000 amount in controversy criterion. The reports of the Senate and House Committees cite the following factors in support of the bill that eventually became 28 U.S.C. § 1362:

> 1. "[T]raditionally, the matters concerning Indian lands under trust allotments fall within the exclusive control of the Federal Government. The judicial determination of controversies concerning such lands commonly is committed to the Federal courts. *Minnesota* v. *United States,* 305 U.S. 382 (1938)."[5]

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[4] 414 U.S. at 678, emphasis added.

[5] H.R. Rep. No. 2040, 89th Cong., 2d Sess. 2 (1966), reprinted in 2 U.S. Code Cong. & Admin. News. (1966) 3145, 3146-3147.

2. "[T]he issues involved in cases involving tribal lands . . . are Federal issues" and "particularly as to this class of cases it is appropriate that the actions be brought in a U.S. district court."[6]

3. "There is great hesitancy on the part of the tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have had of the States in which their reservations are situated."[7]

4. "Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years."[8]

All of these considerations, relied upon by Congress in 1966 and equally applicable here, show that the federal district court is the proper *and preferred* forum for adjudicating Indian water rights. Unquestionably, the adjudication of the Indian water rights involved in this case turns on the application of federal law. *United States* v. *District Court for Eagle County,* 401 U.S. 520, 526 (1971); *Arizona* v. *California,* 373 U.S. 546, 600 (1963). In particular, this case presents two critical issues whose outcome is entirely dependent upon the construction of federal statutes and treaties.

The first is the priority of the water rights of the Southern Ute Reservation. The United States and the Southern Ute Tribe contend that they enjoy an 1868 priority, the date of the treaty between the United States and the Ute Indians, 15 Stat. 619, while the

[6] *Id.*
[7] S. Rep. No. 1507, 89th Cong., 2d Sess. 2 (1966).
[8] *Id.*

defendants contend that the original reservation was terminated by Congress and the succession of title interrupted so that most of the Southern Ute Tribe's water rights have a much later priority, 1938. The second critical issue concerns the extent or measure of the Indian water rights. Are the Utes' water rights to be quantified solely by reference to the amount of water required for agricultural purposes or do their reserved rights also encompass other uses such as the extraction and development of minerals or the maintenance of stream fisheries?[9] The answer turns on a determination of the purposes of the reservation which is preeminently an issue of federal law. *The Kansas Indians,* 72 U.S. (5 Wall.) 737 (1867). Further, the extent of a tribe's water rights may often depend upon the boundaries of the reservation for one measure of the water right is the amount necessary to develop the Indian land. *See, e.g., Arizona* v. *California, supra,* 373 U.S. at 601. Consequently, if state courts are held to have jurisdiction to adjudicate Indian water rights, they might also be authorized to resolve the complex federal questions involved in Indian boundary disputes which have heretofore been committed exclusively to the federal courts.[10]

[9] *See* Arizona v. California, *supra,* 373 U.S. at 600-601 and United States v. Nevada, 412 U.S. 534 (1973).

[10] *See, e.g.,* Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970). In addition to the paramount issues of federal law that are presented in Indian water rights cases, their eventual outcome will also hinge on such critical factual determinations as how much of the reservation's acreage is "practicably irrigable" and how much water is required to irrigate that acreage. Arizona v. California, *supra,* 373 U.S. at 600. On the basis of the record set forth in Part IV of the brief, the Indian amici have reason to be fearful of the outcome if such matters are entrusted to state courts. In enacting 28 U.S.C. § 1362 in 1966 not only did Congress want

Perhaps the most fundamental purpose of the federal court system is to determine precisely such issues of federal law. *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 162-163 (1803); *Bell* v. *Hood,* 327 U.S. 678, 684 (1946). Once their federal question jurisdiction is invoked, the federal courts have never deferred the decision of federal questions to state courts with but one limited exception not applicable here—where the resolution of a doubtful question of state law could obviate the need for determination of the federal, usually constitutional, question. *Harris County Commissioners Court* v. *Moore,* 420 U.S. 77 (1975); *Zwickler* v. *Koota,* 389 U.S. 241, 248-249 (1967); *Harman* v. *Forssenius,* 380 U.S. 528, 534-535 (1965). *See particularly England* v. *Louisiana Medical Examiners,* 375 U.S. 411 (1964).

When these traditional limits on absention are combined with the repeated insistence, both by Congress and this Court, that federal courts are the proper forum for resolving Indian property rights disputes, the petitioners' argument becomes totally untenable. Thus, several lower courts have held that it is particularly inappropriate for federal courts to invoke abstention in cases that raise federal Indian law issues, even where there are doubtful questions of state law presented whose determination by a state court might obviate the need for deciding the federal question. *Moses* v. *Kinnear,* 490 F.2d 21 (9th Cir. 1973); *Walker River Paiute Tribe* v. *Sheehan,* 370 F. Supp. 816 (D. Nev. 1973); and *Great Lakes Inter-Tribal Council, Inc.* v. *Voigt,* 309 F. Supp. 60 (W.D. Wis. 1970) (Doyle, J.).

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federal Indian law issues to be decided by federal courts, it also recognized the legitimacy of the tribes' "great hesitancy . . . to use state courts." See text accompanying note 7 *supra.*

II. The McCarran Amendment Does Not Confer Jurisdiction On State Courts To Adjudicate Indian Water Rights.

The preceding argument assumes the McCarran Amendment applies to Indian water rights and authorizes, but certainly does not require, their adjudication in state court. Even so, an unbroken line of congressional enactments and decisions of this Court make it absolutely clear that federal courts are the proper and preferred forums for resolving Indian property disputes. For this reason, as well as the others urged by the United States in its brief, the district court's dismissal on the grounds of abstention and comity was improper.

The Indian *amici* contend that the district court's dismissal was erroneous in that the court mistakenly assumed, without analysis, that Indian water rights are subject to adjudication in state courts. The court's conclusion was wrong for two reasons. First, the McCarran Amendment's waiver of sovereign immunity applies only to water rights owned by the United States in a proprietary capacity, not to water rights held in trust or restricted status for the benefit of Indians and Indian tribes. Second, even if the McCarran Amendment's waiver of sovereign immunity is applicable to the United States as trustee for Indian water rights, it does not confer subject matter jurisdiction on the state courts. Without an express conferral, state courts lack jurisdiction over Indians and Indian property.

A. The McCarran Amendment Does Not Apply to Indian Water Rights.

The McCarran Amendment does not mention the words "Indian" or "trust" or "restricted." By its terms, the McCarran Amendment waives the sover-

eign immunity of the United States "where it appears that the United States is the owner of or is in the process of acquiring water rights . . . and the United States is a necessary party to such suit." It does not waive the sovereign immunity of Indian tribes.[11]

When Congress refers to Indian property, it customarily uses different words of description. Again the contrast with the contemporaneous Public Law 83-280, *supra,* is instructive. There, Congress specifically referred to Indian waters rights as follows: "real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States." 28 U.S.C. § 1360(b). The water rights are described as "belonging" to the Indian or Indian tribe, not to the United States. The United States is not the proprietary owner; it simply holds the property as trustee or imposes a restriction against alienation. *See also* section (b) of the Act of July 18, 1966, 80 Stat. 304, which refers to "lands of the United States, including trust or restricted lands."

Clearly then, the McCarran Amendment, on its face does not specifically include Indian water rights. The legislative history is inconclusive. What is most revealing is that the author and sponsor of the statute that bears his name, Senator McCarran, was unsure whether it applied to Indian water rights. 97 Cong. Rec. 12948 (1951), exchange between Senators McCarran and Chavez. Of course, as this Court has recently and frequently noted citing a long list of its prior decisions, any and all ambiguities in statutory constructions are to be resolved in favor of the Indians. *Antoine* v. *Washington,* 420 U.S. 194, 199-200 and 206 (1975); *McClanahan* v. *Arizona Tax Commission, supra,* 411 U.S. at 174; *Menominee Tribe* v. *United States,* 391 U.S. 404, 406, n. 2 (1968); and *Squire* v. *Capoeman,* 351 U.S. 1, 6-7 (1956).

[11] *See* United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512-513 (1940).

Since Indian water rights trace their lineage back to this Court's 1908 decision in *Winters* v. *United States,* 207 U.S. 564, whereas the reserved rights of other federal reservations were not firmly established by this Court until its 1963 decision in *Arizona* v. *California, supra,* 373 U.S. at 595-602, it would be easy, but not incorrect, to assume that Congress had Indian reserved water rights squarely in mind when the McCarran Amendment was enacted in 1952. The legislative history (as discussed in the brief of the United States) indicates that Congress focused its attention on private water rights purchased by the United States, such as those at issue in the Santa Margarita litigation.[12] The legislative history is replete with references to the numerous other instances in which the United States acquired private rights through purchase.[13] Indians were, at most, a confused afterthought.

Other than the inconclusive dialogue between Senators McCarran and Chavez previously cited, there

[12] United States v. Fallbrook Public Utility District, 165 F. Supp. 806 (S.D. Cal. 1958) and 347 F.2d 48 (9th Cir. 1965).

[13] *See, e.g.,* 97 Cong. Rec. 12948 (1951), remarks of Senator McCarran.

are only two other references to Indian water rights in the entire legislative history of the McCarran Amendment and its unsuccessful predecessors. They are cited in the petitioner's brief at p. 25, note 13. As the petitioners note, the statements were made during the course of the Senate Committee's hearings by representatives of the Interior and Justice Departments who opposed the bill. It is well settled that such statements "have scant probative value."[14] As this Court recently and emphatically put it:

> "'[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach.' *Labor Board* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 66. 'It is the sponsors that we look to when the meaning of the statutory words is in doubt.' *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384, 394-395."[15]

Several things are certain. Not a single proponent of the McCarran Amendment nor any House or Senate Committee Report indicates a definite intention to include Indian rights within its scope. Neither its language nor its legislative history manifests the explicitness that this Court has held requisite to waive Indian rights, privileges and immunities. *DeCoteau* v. *District County Court,* 420 U.S. 425, 444-445

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[14] National Woodwork Manufacturers Assoc. v. NLRB, 386 U.S. 612, 639 (1967).

[15] *Id.* at 639-640. Other citations omitted. The opinion goes on to say: "In addition to all else, '[t]he silence of the sponsors of [the] amendments is pregnant with significance. . . .' *Labor Board* v. *Fruit & Vegetable Packers, supra,* 377 U.S. at 66."

(1975); *Mattz* v. *Arnett,* 412 U.S. 481, 504-505 (1973); *McClanahan* v. *Arizona Tax Commission, supra,* 411 U.S. at 175, n. 13; and *Menominee Tribe* v. *United States, supra,* 391 U.S. 404. Not a single Indian or representative of any Indian tribe or organization was provided an opportunity to testify at committee hearings concerning the possible impact of the bill on Indians and Indian water rights. To hold, against this background, that Indian water rights are nonetheless covered by the vague words of the McCarran Amendment would constitute precisely the type of "backhanded abrogation" of Indian rights and immunities that was condemned by this Court in *Menominee Tribe* v. *United States, supra,* 391 U.S. at 412. It certainly would not comport with "[t]he overriding duty of our federal government to deal fairly with Indians wherever located." *Morton* v. *Ruiz,* 415 U.S. 199, 236 (1974).

B. The McCarran Amendment Does Not Authorize the Adjudication of Indian Water Rights in State Court.

In the absence of the McCarran Amendment, there would be two jurisdictional or quasi-jurisdictional bars to the adjudication of Indian water rights in state court, the sovereign immunity of the United States and the tribes, *Dugan* v. *Rank,* 372 U.S. 609 (1963), and *United States* v. *United States Fidelity & Guaranty Co., supra,* 309 U.S. at 512-513, and lack of subject matter jurisdiction, *Kennerly* v. *District Court,* 400 U.S. 423 (1971), and *Williams* v. *Lee,* 358 U.S. 217 (1959). The most that the McCarran Amendment could accomplish is the removal of one, but only one, of these obstacles, sovereign immunity. It merely

provides that "[c]onsent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source" and that the "United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto *by reason of its sovereignty*. . . ." (emphasis added). It does not in any way purport to confer subject matter jurisdiction on any court, state or federal.

Thus, assuming *arguendo* that the McCarran Amendment's waiver of sovereign immunity applies to Indian water rights as well as to the water rights owned by the United States in its proprietary capacity, suits to adjudicate Indian water rights can be brought only where there is preexisting subject matter jurisdiction. While the federal courts have such subject matter jurisdiction, the state courts do not. *See Minnesota* v. *United States, supra,* 305 U.S. 382; *Seymour* v. *Superintendent,* 368 U.S. 351 (1962), holding that state courts do not have criminal jurisdiction over crimes committed by Indians in Indian country; *Williams* v. *Lee, supra,* 358 U.S. 217, holding that state courts do not have concurrent jurisdiction over civil actions brought by non-Indians against Indians which arise on non-Indian lands within the reservation; and *Kennerly* v. *District Court, supra,* 400 U.S. 423, following the holding of *Williams* v. *Lee* and also holding that states can acquire civil jurisdiction over Indians in Indian country only by following the procedures prescribed by Congress. The doctrine is nearly as old as the Republic, tracing its genesis to Justice Marshall's seminal opinion in *Worcester* v. *Georgia,*

31 U.S. (6 Pet.) 515 (1832).[16] *See also United States* v. *Kagama,* 118 U.S. 375 (1886), and *McClanahan* v. *Arizona Tax Commission, supra,* 411 U.S. at 175, n. 13.

McClanahan v. *Arizona Tax Commission, supra,* 411 U.S. 164, also illustrates the state courts' lack of subject matter jurisdiction over Indians and Indian lands. It holds that Arizona cannot impose its personal income tax on reservation Indians whose income is derived from reservation sources absent the consent of Congress. One of the reasons for reaching this result was that Arizona acknowledged that its courts could not exercise either civil or criminal jurisdiction over reservation Indians. The court commented: "In light of our prior cases, appellee has no choice but to make this concession" citing *Kennerly* v. *District Court, supra,* 400 U.S. 423, and *United States* v. *Kagama, supra,* 118 U.S. 375. *McClanahan, supra,* 411 U.S. at 478, n. 19. In the absence of civil or criminal jurisdiction, it was impossible to conceive how the state's tax could either be imposed or collected and that, said the court, "would seem to dispose of the case." 411 U.S. at 479.

Several factors make it evident that the McCarran Amendment did not confer subject matter jurisdiction to adjudicate Indian water rights in state courts: (1) its language, particularly as contrasted with Public Law 83-280, *supra;* (2) the express prohibition against state courts adjudicating Indian water rights in the contemporaneous Public 83-280; (3) the absence, again in contrast to Public Law 83-280, *supra,* of any provi-

[16] This Court's recent Indian opinions have looked to and been inspired by the teachings of Worcester. *See* McClanahan v. Arizona Tax Commission, *supra,* 411 U.S. 164 and United States v. Mazurie, 419 U.S. 544 (1975).

sion repealing or waiving or consenting to the amendment of the Indian jurisdictional disclaimers in most of the enabling acts and constitutions of the western states; and (4) the holding and reasoning of *Minnesota* v. *United States, supra,* at 305 U.S. 382. The absence of state court subject matter jurisdiction over Indians and Indian property also distinguishes this case from the *Eagle County* [17] and *Water Division No. 5* [18] cases because state courts do have concurrent jurisdiction over most other federal lands.

1. Nothing in the McCarran Amendment confers jurisdiction.

Once again, comparison of the language of the McCarran Amendment with Public Law 83-280, *supra,* is instructive. Public Law 83-280 expressly confers jurisdiction on the courts of several enumerated states over criminal offenses "committed by or against Indians in [certain] areas of Indian country" and over "civil causes of action between Indians or to which Indians are parties which arise in [certain] areas of Indian country." There is no comparable conferral of jurisdiction in the McCarran Amendment. Public Law 83-280 is a Congressional acknowledgement that state courts can obtain subject matter jurisdiction over Indians and Indian country only through express Congressional grant. *Kennerly* v. *District Court, supra,* 400 U.S. 423.

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[17] United States v. District Court for Eagle County, 401 U.S. 520 (1971).

[18] United States v. District Court in and for Water Division No. 5, 401 U.S. 527 (1971).

2. State court jurisdiction was expressly withheld in Public Law 83-280.

As has already been noted (*supra,* p. 10), Public Law 83-280 expressly withheld from its limited grant of jurisdiction to state courts the power to adjudicate Indian water rights. Petitioners would have us believe that Congress expressly excluded state court jurisdiction over Indian water rights in August 1953 after having made Indian water rights subject to state jurisdiction only one year earlier. Such an absurd result should not be attributed to Congress. *United States* v. *Katz,* 271 U.S. 354, 357 (1926); *United States* v. *Oregon & California R. Co.,* 164 U.S. 526, 539 (1896). The McCarran Amendment and Public Law 83-280, read *in pari materia* [19] yield the inescapable conclusion that Indian water rights were not subjected to adjudication in state courts.

3. The McCarran Amendment does not waive, repeal, or consent to the amendment of the provisions in most of the enabling acts and constitutions of the western states disclaiming jurisdiction over Indian lands.

The enabling acts and/or the constitutions of most of the western states contain explicit provisions disclaiming jurisdiction over Indian lands within their boundaries. A typical example is Arizona's:

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to . . . all lands lying within said

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[19] See Menominee Tribe v. United States, *supra,* 391 U.S. 404, where Public Law 83-280 was read *in pari materia* with the Menominee Termination Act, 25 U.S.C. § 891 *et seq.*

boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that *until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.*[20]

In addition to conferring certain limited civil and criminal jurisdiction over Indians and Indian country

[20] Arizona Enabling Act, 36 Stat. 557, 569, quoted and construed in McClanahan v. Arizona Tax Commission, *supra*, 411 U.S. at 175. This same language appears in Arizona's Constitution at Art. 20, § 4 and in the Enabling Acts and Constitutions of New Mexico (36 Stat. 557, 558-559 and Art. 21, § 2), Utah (28 Stat. 107, 108 and Art. 3, § 2), North Dakota (25 Stat. 676, 677 and Art. 26, § 203), South Dakota (25 Stat. 676, 677 and Art. 22, § 2), Montana (25 Stat. 676, 677 and Art. 12, § 2) and Washington (25 Stat. 676, 677 and Art. 26). The Wyoming and Idaho Enabling Acts and State Constitutions contain similar provisions. *See* Organic Act of Wyoming, 15 Stat. 178, and Art. 21, § 26 of Wyoming Constitution and Organic Act of Idaho, 12 Stat. 808, and Art. 21, § 19 of Idaho Constitution.

The disclaimer clause in the Colorado Enabling Act, 18 Stat. 474, is different in form. It provides: "The constitution shall be republican in form and make no distinction in political rights on account of race or color, except Indians not taxed. . . ."

This disclaimer does more than simply immunize Colorado Indians from state taxation; "Indians not taxed" are words of description. The clause means that Colorado reservation Indians have distinct legal attributes and are not subject to Colorado's civil or political jurisdiction. In any event, this Court and the Colorado Supreme Court have held that the form, or even the absence, of Indian jurisdictional disclaimer provisions makes no material difference so far as the exercise of state jurisdiction is concerned. United States v. Kagama, *supra*, 118 U.S. 375; Donnelly v. United States, 228 U.S. 243, 270-272 (1913); and Whyte v. District Court of Montezuma County, 140 Colo. 344, 346 P.2d 1012 (1959), *cert. denied*, 363 U.S. 829 (1960).

on several enumerated states, Public Law 83-280 also provided a vehicle for other states to obtain jurisdiction. Section 6 of Public Law 83-280, 67 Stat. 588, 590 waives or repeals the disclaimer provisions in state enabling acts and gives the consent of the United States for the people of the states to amend their constitutions or statutes containing "legal impediments" to the assumption of jurisdiction.[21] It further provides "[t]hat the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be." The same provision was reenacted as part of the 1968 amendments to Public Law 83-280, 25 U.S.C. § 1324.

The McCarran Amendment, by stark contrast, is totally silent as to the Indian jurisdictional disclaimer provisions in state enabling acts, state constitutions and state statutes. Congress has properly acknowledged that extension of state jurisdiction to Indians and Indian country requires (1) the waiver or repeal by the United States of such provisions in the enabling acts, (2) the consent of the United States for the people or legislatures of the states to remove any similar legal impediemnts in their constitutions or statutes; and (3) the actual removal of the impediments by the people of the state.[22] Nothing is more indicative of congressional intent *not* to confer state

[21] *See also* section 7 of Public Law 83-280 and Quinault Tribe of Indians v. Gallagher, 368 F.2d 648 (9th Cir. 1966), *cert. denied*, 387 U.S. 907 (1967).

[22] The 1968 amendments to Public Law 83-280 added a fourth requirement, the consent of the affected Indian people. 25 U.S.C. § 1326. *See* Kennerly v. District Court, *supra*, 400 U.S. 423.

courts with subject matter jurisdiction to adjudicate Indian water rights than the absence of any method for removing the legal impediments in the McCarran Amendment. Its absence also further demonstrates that the "comprehensive and detailed congressional scrutiny manifested in those instances where Congress has undertaken to extend the civil or criminal jurisdictions of certain States to Indian country," *Kennerly* v. *District Court, supra,* 400 U.S. at 427, is nowhere to be found in the McCarran Amendment and its legislative history. Without a repeal or waiver of the disclaimer provisions in the state enabling acts, the consent of the United States to the amendment of the similar provisions in state constitutions or statutes, and their actual amendment by the people of the state, the extension of state court jurisdiction to adjudicate Indian water rights cannot be effective.

4. Minnesota v. United States *conclusively demonstrates that the McCarran Amendment did not confer subject matter jurisdiction.*

In 1901, Congress amended the General Allotment Act of 1887, 25 U.S.C. § 331 *et seq.,* 24 Stat. 388, by making Indian allotted land subject to condemnation under the laws of the state where located in the same manner as land owned in fee. 25 U.S.C. § 357, 31 Stat. 1058, 1083, 1084. Pursuant to this statute, Minnesota brought suit in state court to condemn a right of way for a highway over several parcels of allotted land within the Grand Portage Indian Reservation. The United States was named as defendant. The United States Attorney, appearing specially, removed the case to the federal court which entered a judgment condemning the land.

On review (*Minnesota* v. *United States, supra,* 305 U.S. 382), this Court held: first, that the United States was an indispensable party to the condemnation suit; second, that the United States could not be sued without its consent; third, that while 25 U.S.C. § 357 constituted a waiver of the government's sovereign immunity, it did not confer subject matter jurisdicion on state courts because "the judicial determination of controversies concerning [Indian lands] has been commonly committed exclusively to federal courts," 305 U.S. at 389; and further, that since the federal court's jurisdiction on removal was derivative, it did not and could not acquire jurisdiction that was lacking in the state court. The suit was therefore dismissed.

If state courts did not obtain jurisdiction by a statute making Indian lands subject to condemnation under state laws in the same manner as land owned in fee, *a fortiori* state courts could not obtain jurisdiction under the McCarran Amendment where (a) there was no mention of Indians or Indian lands; (b) state substantive laws were not made applicable to Indian lands; and (c) there was no provision that Indian lands were to be accorded the same treatment as fee lands.

5. Eagle County *and* Water Division No. 5 *distinguished: exclusive federal jurisdiction over Indian reservations vs. concurrent federal-state jurisdiction over most other federal lands.*

In *Minnesota* v. *United States, supra,* the United States contended that "a statute granting permission to sue the United States must be construed to apply only to the Federal courts unless there is an explicit

reference to the state tribunals." 305 U.S. at 389, n. 5. This Court refused to accept this broad contention citing, *inter alia, United States* v. *Jones,* 109 U.S. 513 (1883). Its holding in favor of the United States was predicated instead on narrower grounds, the unique federal-Indian relationship and the federal courts' exclusive jurisdiction to resolve controversies concerning Indian lands. 305 U.S. at 389 and n. 5. This aspect of *Minnesota* v. *United States* is crucial to understanding the difference between the Indian water rights at issue in this case and the water rights owned by the United States in its proprietary capacity involved in the *Eagle County* and *Water Division No. 5* cases.

Eagle County and *Water Division No. 5* hold that the reserved and other water rights owned by the United States in its proprietary capacity are subject to adjudication in state courts under the McCarran Amendment. The Court's opinions do not address the subject matter jurisdiction issue and the United States did not contend the federal courts have exclusive jurisdiction over the federal lands and interests involved in the two cases.[23]

The issue was not addressed by the United States and the Court for a good reason—most federal lands owned by the United States in its proprietary capacity, unlike the lands and water rights of *amici* Southern Ute and Ute Mountain Ute Indian Tribes at is-

[23] The primary arguments advanced by the United States were that the McCarran Amendment's waiver of sovereign immunity did not attach to reserved, as opposed to acquired or appropriated, water rights and that the Colorado adjudications were not the type of general stream adjudications to which the United States consented. *See* briefs of the United States in Nos. 87 and 812, October Term, 1970.

sue here, are subject to concurrent federal and state jurisdiction. It was not necessary for the McCarran Amendment to confer subject matter jurisdiction on state courts to adjudicate water rights owned by the United States in its proprietary capacity because the state courts had preexisting jurisdiction over these federal lands. Once the McCarran Amendment removed the sovereign immunity obstacle, the state courts were free to exercise their concurrent jurisdiction.

The doctrine of concurrent federal-state jurisdiction over most federally owned, non-Indian lands stems from *New Orleans* v. *United States,* 35 U.S. (10 Pet.) 662 (1836), and *Pollard* v. *Hagan,* 44 U.S. (3 How.) 212 (1845). When a new state is created, the United States keeps title to the land that it chooses to retain, but general governmental jurisdiction over the land is held to pass to the state. Later cases seem to erode the absolutism of *New Orleans* and *Pollard,* particularly as applied to the western states. While it may be difficult to pinpoint precisely where state authority begins and federal authority ends and *vice versa,* and it is not necessary for our limited purposes here to do so; the law now appears settled that jurisdiction over most federal lands is concurrent. The best statements of the current law seem to be *Utah Power and Light Co.* v. *United States,* 243 U.S. 389, 404-405 (1917); *Omaechevarria* v. *Idaho,* 246 U.S. 343 (1918); and *McKelvey* v. *United States,* 260 U.S. 353 (1922).[24] *See also* 16 U.S.C. § 480 (states re-

[24] In Utah Power and Light, the Court said: [F]or many purposes a state has civil and criminal jurisdiction over lands within its limits belonging to the United States . . . [W]hile the state may punish public offenses, such as murder or larceny, committed

tain civil and criminal jurisdiction within national forests.)

We have repeatedly and advisedly said that joint federal-state jurisdiction is the rule with regard to "most" federal lands other than Indian reservations because there are some federally owned lands other than Indian reservations where the United States exercises exclusive jurisdiction. For the most part, these are federal lands acquired under and in accordance with Article I, § 8, cl. 17 of the Constitution.[25] The contrast between areas of exclusive and concurrent jurisdiction is discussed at some length in *Surplus Trading Post* v. *Cook*, 281 U.S. 647 (1930).[26] *See also Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518

on such lands, and may tax private property, such as livestock, located thereon, it may not tax the lands themselves or invest others with any right whatever in them" 243 U.S. at 404. Similarly, McKelvey states: "It is firmly settled that Congress may prescribe rules respecting the use of the public lands. . . . It is also settled that the states may prescribe police regulations applicable to public lands areas, so long as the regulations are not arbitrary or inconsistent with applicable congressional enactments." 260 U.S. at 359.

[25] "The Congress shall have Power To exercise [exclusive Legislation] over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

[26] The discussion of Indian Reservations in Surplus Trading Post v. Cook, *supra*, is, of course, *dicta*. It is somewhat misleading but the Court has subsequently put it in proper perspective by carefully limiting its applicability to state jurisdiction over activities of non-Indians within the reservation that do not in any way interfere with tribal self-government. McClanahan v. Arizona Tax Commission, 411 U.S. 164, particularly at 168 and 179-180. *See also* McClanahan's clarification of Organized Village of Kake v. Egan, 369 U.S. 60 (1962), 411 U.S. at 176, n. 15.

(1938). But exclusive federal jurisdiction over non-Indian federal lands and reservations is the exception, not the rule.[27]

Here then, is the lesson to be learned from all of this. A statute granting permission to sue the United States that does not specify any particular forum[28] is construed to apply to any court with preexisting subject matter jurisdiction. The government's argument that such statutes should be limited to authorizing suits only in federal court unless there is a specific reference to state courts was rejected in *Minnesota* v. *United States, supra*, 305 U.S. 382. Since most federal, non-Indian lands are subject to concurrent federal and state jurisdiction, *Eagle County* and *Water Division No. 5*, correctly held that the McCarran Amendment's waiver of sovereign immunity permitted the adjudication of the government's proprietary water rights in state courts. However, because only the federal courts have preexisting subject matter jurisdiction over Indian property interests, a statute that permits suits against the United States in its capacity

[27] A May 1969 report entitled "Federal Legislative Jurisdiction" prepared by the Lands and Natural Resources Division of the Department of Justice for the Public Land Law Review Commission states at p. 56: [T]he great bulk of federally owned areas which constitute the lands of the public domain, including the great majority of such areas which have been reserved or withdrawn for various Federal purposes, constitute to be held by the United States merely in a proprietorial status, with legislative jurisdiction remaining in the respective host States.

[28] Of course, since the government can condition its waiver of sovereign immunity in any way that it pleases, it can specify and limit the forums in which it elects to be sued. *See, e.g.*, the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 *et seq.* This case and the Minnesota case deal with instances in which Congress did not specify the forum.

as trustee of Indian lands or water rights applies only to federal courts unless the statute very explicitly extends jurisdiction to the state courts. That is the teaching of *Minnesota* v. *United States, supra.* The McCarran Amendment did not confer subject matter jurisdiction on any court to adjudicate any water rights.[29] It did not have to. It simply waived the government's sovereign immunity which had the effect of authorizing water rights adjudications against the United States in any court with preexisting subject matter jurisdiction. The critical distinction between this case on the one hand and *Eagle County* and *Water Division No. 5* on the other is that federal courts have exclusive jurisdiction to resolve Indian property disputes whereas Federal and state courts have concurrent jurisdiction over most other federal lands.

III. Adjudicating Federal and Indian Water Rights In Federal Court Will Not Create Any Practical Problems Or Cause a Crisis In Federal-State Relations.

The broad problem presented in this case is how to reconcile the interests of the state and its courts in maintaining jurisdiction and control over the water rights established pursuant to state law with the interests of the United States, the Nation's Indian tribes and the federal courts in having questions of federal and Indian law resolved in the federal courts. This problem has not been adequately addressed by either the parties or the lower courts.

This case is here on a motion to dismiss that was granted by the district court. The decision of the court

[29] That is the conclusion of the only court to address this question. *In re* Green River Drainage Area, 147 F. Supp. 127, 134 (D. Utah, 1956).

of appeals, simply and properly reverses the district court's dismissal and requires that the federal questions raised by the complaint of the United States be litigated and determined in a federal court. It does not in any way limit the district court's discretion in its subsequent management of this litigation. All of the practical problems of duplication, administration, etc., recited by the petitioners and the *amici* who support them can easily be resolved through the application of commonplace techniques for the management of complex federal litigation.

Specifically, contrary to the repetitious, wholly unsupported assertions of the petitioners and the *amici* states, there is nothing in the court of appeals' decision that precludes the district court from:

(a) bifurcating the case pursuant to Rule 42(b), F.R.C.P.;

(b) limiting the first phase of the case to determining the federal questions involving the extent and priority of the water rights of the Southern Ute and the Ute Mountain Ute Indian Tribes and the other rights claimed by the United States;

(c) ordering that the adjudication of the rights claimed by the defendants and intervenors under state law proceed in state court;

(d) ordering the United States to appear in state court to defend against the claims of the defendants and intervenors;

(e) eventually incorporating the state court decree defining the water rights of the defendants and intervenors in its final judgment; and,

(f) appointing the state court's water master to enforce the federal decree.

Would not the principles underlying federalism and comity be furthered by this kind of bifurcation, with federal matters being decided in federal courts and state matters in state courts with a final decree integrating the two for purposes of administration and enforcement? There is a role for the federal courts in a properly functioning federalism. If, in the exercise of its sound discretion, the district court elects to proceed with this case as we have just outlined or in some similar manner, the tale of woes imagined in the briefs of petitioners and their *amici* will disappear. They were highly suspect at the outset.[30]

There need not be any unnecessary expense, duplication, hardship [31] or confusion resulting from the federal district court in Denver doing what Federal district courts have always done—deciding federal questions and enforcing federal and Indian rights. And if that causes a rupture in federal-state relations, it is hardly the fault of the federal government or the federal courts.

[30] The National Water Commission, a respected expert body established by Congress (Act of September 26, 1966, 82 Stat. 868), whose members were appointed by the President, conducted a comprehensive analysis of the problems raised by this type of litigation, heard from almost everybody and then recommended in its recent report that all Indian water rights be adjudicated exclusively in federal district courts. It also recommended that all other federal water rights be determined under state procedures with a right to appeal to the United States Courts of Appeals. "Water Policies for the Future, Final Report to the President and to the Congress of the United States by the National Water Commission," 1973, Chapters 13 and 14. Surely, if the problems of so-called dual jurisdiction are as horrendous as the petitioners and their amici make them out to be, and if the federal and state court decrees could not be integrated and administered into a workable framework, the National Water Commission would not have made such recommendations.

[31] In all likelihood, the burden of defending against the claims of the United States and the Indian Tribes will be borne primarily by the same defendants and intervenors who filed the motion to dismiss and who appear in this Court as the actual petitioners. Mary Akin is not here. The State of Colorado is. So are the Board of Water Commissioners of the City and County of Denver and the Colorado River Conservation District.

Let us stop the charade. The practical problems are not what is motivating the defendants. If they were out to reconcile the competing federal, state and Indian interests involved in this litigation, they would certainly have chosen a less blunt instrument than the clumsy and crude motion to dismiss. Like almost all choice of forum battles, this one involves primarily strategic considerations. The Indian *amici* have no hesitancy in stating that they prefer the federal forum. Unfortunately perhaps, the sad history of Indian-white relations in this country up to and including contemporary times demonstrates that it is to the federal courts that Indians must go for the vindication of their rights.

IV. There Is Good Reason For The Insistence By Congress and This Court That Indian Property Rights Be Adjudicated In Federal Courts.

The historical animus between the Nation's Indian tribes and the people of the states is too well known to require documentation. This Court's decision in *Worcester* v. *Georgia, supra,* 31 U.S. (6 Pet.) 515 provoked perhaps the first constitutional confrontation between the executive and judicial branches of government. Eighty-nine years ago, in upholding the constitutionality of an Act of Congress making it a federal crime for one Indian to murder another, the Supreme Court said:

> These Indian tribes are the wards of the Nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.

United States v. *Kagama, supra,* 118 U.S. at 383-384 (emphasis in original). Indeed, the federal government's powerful and pervasive role in Indian affairs grew directly out of the Indians' overwhelming need for protection from the states. See the original Indian Nonintercourse Act, 1 Stat. 137 (1790), now 25 U.S. C. § 177 and *Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U.S. 991 (1960).

What tends to be more surprising to those not familiar with the work-a-day world of Indians is that the adversary relationship with the states continues to this day. This Court commented upon it recently in *Oneida Indian Nation* v. *County of Oneida, supra,* 414 U.S. at 678, quoted *supra* at p. 11.

Part of the reason for the Indians' fear of subjecting their water and other property rights to adjudication in state courts is shown by an analysis of the recent record of Indian litigation in this Court. During its past three terms, the Court reversed or vacated seven decisions of state courts that were adverse to Indian property or sovereign interests in which a state, or one of is agencies, sought affirmance. Most of the decisions were unanimous. One was reversed in part and affirmed in part. The seven are: *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973), reversed in part (9-0) and affirmed in part (6-3); *McClanahan* v. *Arizona Tax Commission, supra,* 411 U.S. 164, reversed (9-0); *Tonasket* v. *Washington,* 411 U.S. 451 (1973), vacated (9-0); *Mattz* v. *Arnett, supra,* 412 U.S. 481, reversed (9-0); *Washington Game Dept.* v. *Puyallup Tribe,* 414 U.S. 44 (1973), reversed (9-0); *Satiacum* v. *Washington,* 414 U.S. 1 (1973), vacated (9-0); and *Antoine* v. *Washington, supra,* 420 U.S. 194, reversed (7-2). The states' positions in two cases that arose in the federal courts were also unanimously repudiated, *Oneida Indian Nation* v. *County of Oneida, supra,* 414 U.S. 661, in which New York filed a brief *amicus curiae* and participated in the oral argument, and *United States* v. *Mazurie, supra,* 419 U.S. 554, in which Wyoming filed a brief *amicus curiae* and participated in oral argument. Standing alone on the other side is the affirmance (6-3) of the South Dakota Supreme Court in *DeCoteau* v. *District County Court, supra,* 420 U.S. 425.

Going back past the three most recent terms in which Indian cases appeared with unusual frequency, the record is not much better. The official positions of the states and/or their courts were rejected in nine cases, all but three unanimously: *Williams* v. *Lee, supra,* 358 U.S. 217, (9-0); *Seymour* v. *Superintendent, supra,* 368 U.S. 351, (9-0); *Metlakatla Indian Comm.* v. *Egan,* 369 U.S. 45 (1962); *Arizona* v. *California, supra,* 373 U.S. 546, 595-602, (8-0); *Warren Trading Post* v. *Arizona Tax Commission, supra,* 380 U.S. 685, (9-0); *Poafpybitty* v. *Skelly Oil Co.,* 390 U.S. 365 (1968), (8-0); *Menominee Tribe* v. *United States, supra,* 391 U.S. 404, (6-2); *Choctaw Nation* v. *Oklahoma, supra,* 397 U.S. 620, (7-2); and *Kennerly* v. *District Court, supra,* 400 U.S. 423, (7-2). State positions were upheld only three times over that same 1959 to 1971 period; *Federal Power Commission* v. *Tuscarora*

Indian Nation, supra, 362 U.S. 991, (6-3); *Organized Village of Kake* v. *Egan, supra,* 369 U.S. 60, (9-0) and *Puyallup Tribe* v. *Dept. of Game,* 391 U.S. 392 (1968), (9-0).[32] One must search the records of the Supreme Court back to 1949 to find the last time that a state court decision favorable to Indians was reversed. In that case, *Oklahoma Tax Commission* v. *Texas Co.,* 336 U.S. 342 (1949), the court overruled one of its own prior decisions on which the state court had relied.

Anyone who seriously questions why Indians are distrustful of state authorities need look no further than Western Washington's recent fishing rights controversy, *United States* v. *Washington,* 384 F. Supp. 312 (W.D. Wash. 1974), affirmed, —— F.2d —— (9th Cir. 1975). Judge Boldt's extensive findings of fact are fortunately included with his published opinion. We quote from just a few that will illustrate our point:

> 194. In dealing with fishing by members of the Plaintiff tribes in a manner different from that expressly provided in their respective regulations, both the Game Department and the Department of Fisheries have seized nets and other property of those members and have released, confiscated and attempted to prevent the sale and transportation of anadromous fish which are under their respective jurisdictions and which have been caught by those members.

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[32] Most of the Indian cases that found their way to this Court since 1959 through the state courts arose as either appeals from criminal convictions, typically for alleged violations of state hunting and fishing laws, or as applications for tax refunds. For obvious reasons, they could not have originated in the federal courts.

> 195. Both the Fisheries and Game Departments have, on several occasions, disposed of or retained for unusually long period of time (often extending over longer periods than one year) boats, nets, whether attended or unattended, or other property of members of the Plaintiff tribes and fish taken from the nets of such members. The tribal members have not been notified of the institution of any proceedings for, or acquisitions of, judicial confiscations or forfeitures of said items by the State.[33]

Twice during the continuing course of the *United States* v. *Washington* litigation, the district court found it necessary to stay injunctions issued by, and courts.[34] In both instances, the Superior Court of the State of Washington for Thurston County issued injunctions that purported to prohibit the Director of Washington's Department of Fisheries from enforcing regulations issued in compliance with the orders of the federal court.[35]

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[33] United States v. Washington, *supra,* 384 F. Supp. at 388, citations omitted. Judge Boldt's decision was recently affirmed in all but one minor respect. United States v. Washington, *supra,* —— F.2d ——. District Judge Burns, sitting by designation on the Court of Appeals, wrote a short concurring opinion commenting on what he termed the "recalcitrance of Washington State officials" not only in the United States v. Washington litigation, but in two other cases that eventually reached this Court, Antoine v. Washington, *supra,* 420 U.S. 194, and the Puyallup cases, Washington State Game Dept. v. Puyallup Tribe, *supra,* 414 U.S. 44, and Puyallup Tribe v. Department of Game, *supra,* 391 U.S. 392.

[34] Unreported Memorandum Decision and Injunction dated September 12, 1974 and Injunction dated August 6, 1975 in United States v. Washington, *supra,* Civil No. 9213 in the United States District Court for the Western District of Washington at Tacoma.

[35] Puget Sound Gill Netters Association v. Tollefson, No. 50757 and Purse Seine Vessel Owners Assoc. v. Moos, Cause No. 2881.

United States v. *Washington* tells all there is to know about why Indians fight so vehemently to have disputes involving their property resolved in the federal court system. In words that are well worth pondering, particularly here where we are so deluged with unsupported claims of practical problems allegedly caused by the exercise of federal jurisdiction, Judge Boldt spoke of the practical problems attendant upon the exercise of state jurisdiction over off reservation Indian treaty rights.

> [S]tate regulation of off reservation treaty right fishing is highly obnoxious to the Indians and in practical application adds greatly to already complicated and difficult problems and may stimulate continuing controversy and litigation long into the future.[36]

What is most important is that as recently as 1966 Congress recognized both the existence and the legitimacy of the Indians' fear of state courts. Acting partially in response to those fears and also out of conviction that federal Indian law issues should be litigated in the federal courts, Congress enacted a special jurisdictional statute that applies only to suits, primarily involving property rights, brought by the Nation's federally recognized Indian tribes. 28 U.S.C. § 1362. See discussion *supra,* pp. 11-12. This Court should certainly do everything within its power to see to it that these Congressional policies are implemented.

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[36] United States v. Washington, *supra,* 384 F. Supp. at 339.

V. The Petitioners' Concept Of "Unitary" State Water Adjudication Systems Is a Fiction: Their Principal Authorities Are Inapposite.

The petitioners and the *amici* states posit the fiction of "unitary," "comprehensive," and "historic" state water adjudication systems whose all-encompassing and all-embracing nature allegedly leaves no room for the federal courts to resolve the federal questions on which the extent and priority of federal and Indian water rights depend. This is more than mere bravado. Maintenance of this fiction is essential to bring this case in line with *Burford* v. *Sun Oil Company,* 319 U.S. 315 (1943), and its progeny, on which they place their principal reliance.

The Indian *amici* submit that it is the petitioners and the *amici* states who would have this Court ignore the history of federal, Indian and state relations in this area. There has never been a "unitary" state water adjudication system. Historically, state courts have recognized their lack of jurisdiction to adjudicate Indian water rights.[37] Virtually without exception, every prior adjudication of Indian water rights has taken place in the federal courts.[38] *See also* 25

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[37] *See, e.g.,* Anderson v. Spear Morgan Livestock Co., 107 Mont. 18, 79 P.2d 607 (1938).

[38] *See* the 13 (according to our count) reported federal court decisions concerning Indian water rights cited in the chapter on "Indian Water Rights" in 2 Clark, Waters and Water Rights, Chapter 10, 1967. There are numerous other unreported federal court decrees defining Indian rights. The chapter cites two aberrational state court decisions, Byers v. Wa-Wa-Ne, 86 Ore. 617, 169 Pac. 121 (1917), which nicely illustrates why Indians resist state court jurisdiction, and Biggs v. Utah Irrigating Ditch Co., 7 Ariz. 331, 64 Pac. 494 (1901), involving a unique situation in which Indians claimed prescriptive rights to share water from a ditch in common with non-Indians off the reservation who owned and operated the ditch.

U.S.C. § 381 which contradicts petitioner's theory of unitary state control. There is no indication in the McCarran Amendment or its legislative history that the historic practice of leaving Indians on reservations free of state jurisdiction and control, *Rice* v. *Olson, supra,* 324 U.S. at 789, was to be discontinued or abandoned or that it gave rise to any of the problems now being urged. It was not until some 20 years after the McCarran Amendment was enacted that the states, or anyone else, claimed that it provided the requisite authority for Indian water rights to be adjudicated in state courts. Indeed, prior to the assertion of that claim in this case, one of the *amici* states, New Mexico, initiated several proceedings in federal court to adjudicate the water rights of eighteen Pueblos in New Mexico which are still pending.[39]

Burford v. *Sun Oil Co., supra,* 319 U.S. 315 and *Alabama Public Service Commission* v. *Southern Ry. Co.,* 341 U.S. 341 (1950) were diversity cases involving claims of denial of due process by state regulatory agencies. In both cases, the plaintiffs chose to attack the validity of orders issued by the state agencies in federal district courts rather than to pursue their remedies through the state courts. They both dealt with matters that were governed by state substantive law and necessarily required the exercise of considerable discretion as well as policy-making within areas that Congress specifically left to the control of the states. The functions of the state regulatory agencies did not even approximate the adjudication of property rights claimed under and based on federal substantive law. In both cases, this Court wisely held

[39] See Brief of the United States in Opposition to the Petitions for Certiorari at p. 9.

that the federal courts should not allow the state appellate machinery to be circumvented. These cases do not bear the slightest resemblance to this case.[40]

What the federal district court is being asked to do in this case is no different than what this Court did with regard to the water rights of the United States and five Indian Tribes located in three states in *Arizona* v. *California, supra,* 373 U.S. at 595-601, decree, 376 U.S. 340 (1964). Once the priority and amount of the Indians' and federal water rights were fixed by the decree, they could be integrated into any ad-

[40] Another case on which petitioners rely and totally distort is Pacific Live Stock Co. v. Oregon Water Board, 241, U.S. 440 (1916). (See Petitioners' Brief at pp. 20-21 and 25-58.) The plaintiffs in that case sought to enjoin a proceeding conducted by a state agency to determine all water rights on a particular stream. Plaintiffs claimed that the state statute was unconstitutional on due process grounds and that the injunction was necessary to protect the jurisdiction of the federal district court in two pending private diversity suits brought by the plaintiff to enjoin alleged encroachments on his rights. This Court refused to enjoin the state administrative proceeding. It did not enjoin or dismiss or take any other action concerning the cases pending before the district court. It stated that a general adjudication was preferable to piecemeal litigation through private suits. It did not involve the adjudication of any rights based on federal law or the propriety of removal from state to federal court. The federal district court's remand of the attempted removal of the state administrative proceeding took place before the injunctive action was filed. The district court's prior remand order was based on its determination that the removal statute did not apply to state administrative proceedings, 241 U.S. at 445-446. This Court's opinion specifically noted that the remand order was "final and conclusive" and "not subject to review either directly or indirectly." 241 U.S. at 447. It did not say anything about the desirability of litigating general stream disputes or private encroachment suits in either federal or state courts although we certainly have no quarrel with the proposition that such suits should be litigated in state courts when, as in Pacific Live Stock, there are no federal questions presented.

ministrative apparatus for their enforcement. There is certainly no indication whatsoever that this Court's decree in *Arizona* v. *California, supra,* adjudicating federal and Indian water rights interfered in any way with the procedures in California, Nevada and Arizona for determining the water rights of their respective claimants under state law. See Part III *supra.*

The system of adjudicating Indian water rights in federal court has been with us for a long time. Prior to this case no one complained about it. There is no evidence that the "dual" system it has produced has proved unworkable or unmanageable. If it is not as efficient as a unitary system, that is a consequence of federalism and the unique role occupied by Indians in the federal system. Congress has consistently acted in the belief that the federal courts alone were the proper forums for the resolution of Indian property disputes. If the petitioners and their *amici* believe that a departure from this historic procedure is warranted, their argument should be addressed to Congress. *Williams* v. *Lee,* 358 U.S. 217, 223 (1959).

CONCLUSION

The decision of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submittted,

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1 October 1975

APPENDIX

APPENDIX

Act of August 15, 1953, 67 Stat. 588, Public Law 83-280

AN ACT

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of — Indian country affected

California—All Indian country within the State
Minnesota—All Indian country within the State, except the Red Lake Reservation
Nebraska—All Indian country within the State
Oregon—All Indian country within the State, except the Warm Springs Reservation
Wisconsin—All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

SEC. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of — Indian country affected

California—All Indian country within the State
Minnesota—All Indian country within the State, except the Red Lake Reservation
Nebraska—All Indian country within the State
Oregon—All Indian country within the State, except the Warm Springs Reservation
Wisconsin—All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by any Indian tribe, band, or community

in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided,* That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

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